# 85-1279

No.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

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UNITED NUCLEAR CORPORATION,
KERR-MCGEE CORPORATION,
QUIVIRA MINING COMPANY and
HOMESTAKE MINING COMPANY OF CALIFORNIA,
*Petitioners,*

v.

ENVIRONMENTAL PROTECTION AGENCY,
*Respondent.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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## QUESTION PRESENTED

Whether standards promulgated by the Environmental Protection Agency under the Uranium Mill Tailings Radiation Control Act of 1978 are invalid because the EPA failed to find that mill tailings present significant risks to the public health, safety and environment.

## PARTIES TO THE PROCEEDING

Petitioners herein are United Nuclear Corporation, Kerr-McGee Corporation, Quivira Mining Company and Homestake Mining Company of California.* Petitioners seek review of the judgments below in two closely related cases. The parties to the proceedings below not listed in the caption of the case in this Court include:

(a) In *American Mining Congress, et al.* v. *Thomas, et al.*, 772 F.2d 617 (10th Cir. 1985) (App. A, *infra*, 1a-42a): American Mining Congress, Sierra Club, the Environmental Defense Fund, Inc., National Resources Defense Council, Southwest Research and Information Center, and Jean Slattery, petitioners below, and Lee M. Thomas, Administrator of the Environmental Protection Agency, respondent below; and

(b) In *American Mining Congress, et al.* v. *Thomas, et al.*, 772 F.2d 640 (10th Cir. 1985) (App. B, *infra*, 43a-64a): American Mining Congress, Amax, Inc., Solar Lobby, the Environmental Defense Fund, Inc., National Wildlife Federation, Sierra Club, Al Mangan, Chauncey Kepford and Judith H. Johnsrud, petitioners below, and Lee M. Thomas, Administrator of the Environmental Protection Agency, respondent below.

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* Petitioner United Nuclear Corporation is a wholly-owned subsidiary of UNC Resources, Inc. Petitioner Kerr-McGee Corporation has the following non-wholly owned subsidiaries or affiliates: Brewster Phosphates; Basic Management, Inc.; Bikita Minerals (Private), Ltd.; Crescent Petroleum Company; Downtown Airpark, Inc.; Little Medicine Development Company; San-Ann Service, Inc.; Texoma Pipe Line Company; White Shoal Pipeline Corporation; Kerr-McGee Oil (U.K.), Ltd.; Marine Resources Insurance, Ltd.; Sunningdale Oils (Ireland), Ltd.; Sunningdale Oils (U.K.) Ltd.; Transocean Drilling Company, Ltd.; Transocean Drilling (Curacao) N.V.; Transocean Drilling Company (U.K.), Ltd.; Transshore Drilling (Curacao) N.V.; Transworld Drilling Company (Nigeria), Ltd.; Transworld Drilling (U.K.), Ltd.; and Transworld North Sea Drilling Services, Ltd. Petitioner Quivira Mining Company is a wholly-owned subsidiary of Kerr-McGee Corporation. Petitioner Homestake Mining Company of California (formerly Homestake Mining Company, a California Corporation) is a wholly-owned subsidiary of Homestake Mining Company, a Delaware corporation.

TABLE OF CONTENTS


| | Page |
|---|---|
| Opinions Below | 1 |
| Jurisdiction | 2 |
| Statute and Regulations Involved | 2 |
| Statement of the Case | 2 |
| A. The Target of EPA's Standards | 3 |
| B. Statutory and Regulatory Background | 5 |
| C. The EPA Standards at Issue | 8 |
| D. Opinions of the Court Below | 9 |
| Reasons for Granting the Petition | 11 |
| A. The Tenth Circuit Misinterpreted Both UMTRCA and the *Benzene* Case | 12 |
| B. The 1982 UMTRCA Amendments and Legislative History Reaffirm the Significant Risk Requirement | 15 |
| Conclusion | 20 |

## TABLE OF AUTHORITIES

*Cases:* Page

*American Textile Manufacturers Institute, Inc.* v. *Donovan*, 452 U.S. 490 (1981) ..... 14
*Center for Auto Safety* v. *Peck*, 751 F.2d 1336 (D.C. Cir. 1985) ..... 14
*Federal Energy Administration* v. *Algonquin SNG, Inc.*, 426 U.S. 548 (1976) ..... 16
*Industrial Union Department, AFL-CIO* v. *American Petroleum Institute*, 448 U.S. 607 (1980) .. 10, 12, 14-15
*Kalaris* v. *Donovan*, 697 F.2d 376 (D.C. Cir.), *cert. denied*, 462 U.S. 1119 (1983) ..... 15
*Pan American Airways, Inc.* v. *Civil Aeronautics Board*, 380 F.2d 770 (2d Cir. 1967), *aff'd*, 391 U.S. 461 (1968) ..... 16
*Philadelphia Electric Co., et al.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-701, 16 NRC 1517 (1982), *petition for review held in abeyance*, CLI-83-14, 17 NRC 745 (1983) ..... 5
*Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, 444 U.S. 572 (1980) ..... 15
*State of Kansas ex. rel. Stephan* v. *Adams*, 608 F.2d 861 (10th Cir. 1979), *cert. denied*, 445 U.S. 963 (1980) ..... 16

*Statutes and regulations:*

Atomic Energy Act of 1954, as amended, 42 U.S.C. §§ 2011 *et seq.*:
42 U.S.C. § 2012(a) ..... 3
42 U.S.C. § 2021 ..... 6

Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651 *et seq.* ..... 14
Uranium Mill Tailings Radiation Control Act of 1978, Pub. L. No. 95-604, 92 Stat. 3021 (1978) (codified as amended at 42 U.S.C. § 2014 and scattered sections thereafter and at 42 U.S.C. §§ 7091-42) ..... *passim*

TABLE OF AUTHORITIES—Continued


| | Page |
|---|---|
| 42 U.S.C. § 2022(a) | 8, 15 |
| 42 U.S.C. § 2022(b) | 8, 15 |
| 42 U.S.C. § 2022(c)(2) | 9 |
| 42 U.S.C. § 2114(a) | 7, 8 |
| 42 U.S.C. § 7901(a) | 7, 12, 13 |
| 10 C.F.R. Part 20 | 6, 8, 13, 19 |
| 48 Fed. Reg. 590 *et seq.* (Jan. 5, 1983) | *passim* |
| 48 Fed. Reg. 45926 *et seq.* (Oct. 7, 1983) | *passim* |
| 47 Fed. Reg. 58202 (Dec. 29, 1982) | 5 |
| *Miscellaneous:* | |
| 128 Cong. Rec. E5060 (daily ed. Dec. 10, 1982) | 20 |
| 128 Cong. Rec. H8807, 8816 (daily ed. Dec. 2, 1982) | 19 |
| 128 Cong. Rec. S2977 (daily ed. March 30, 1982) | 18 |
| 128 Cong. Rec. S13055-56, 13293 (daily ed. Oct. 1, 1982) | 17-18 |
| 128 Cong. Rec. S15315 (daily ed. Dec. 16, 1982) | 18 |
| 131 Cong. Rec. E4275 (daily ed. Oct. 1, 1985) | 3 |
| Energy Information Administration, *Domestic Uranium Mining and Milling Industry: 1984 Viability Assessment*, DOE/EIA-0477 (Washington, D.C. Sept. 1985) | 3 |
| EPA, *Final Environmental Impact Statement For the Control of Byproduct Materials from Uranium Ore Processing* (40 C.F.R. 192), EPA-520 (Sept. 1983) | 4, 5, 9 |
| *Hearing on H.R. 2236 and S.1004: Financing Remedial Actions at Active Uranium And Thorium Processing Sites, Before The House Comm. on Interior and Insular Affairs, Subcomm. on Energy and the Environment*, 99th Cong., 1st Sess. (July 16, 1985) | 3 |
| *Hearings on EPA Radon and Radionuclide Emission Standards Before The House Subcomm. on Procurement and Military Nuclear Systems of the Comm. on Armed Services*, 98th Cong., 1st Sess., 85 (Oct. 6, 1983) | 4 |

TABLE OF AUTHORITIES—Continued

Page

House Conf. Rep. No. 884, 97th Cong., 2d Sess. (1982) ..... 15
H.R. Rep. No. 1480, 95th Cong., 2d Sess., Pts. 1 and 2 (1978) ..... 6, 10, 13
*U.S. Uranium Mines, Thriving 5 Years Ago, Are Nearing Extinction*, Wall St. J., June 12, 1985 ..... 3
U.S. Department of Health, Education and Welfare, Public Health Service, *Evaluation of Radon 222 Near Uranium Tailings Piles*, DER 69-1 (March 1969) ..... 5
*Uranium Mill Tailings Radiation Control Act of 1978: Hearings on H.R. 13382, H.R. 12938, H.R. 12535 and H.R. 13049 Before the Subcomm. on Energy and Environment of the House Comm. on Interior and Insular Affairs*, 95th Cong., 2d Sess. (1978) ..... 13

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

---

United Nuclear Corporation, Kerr-McGee Corporation, Quivira Mining Company and Homestake Mining Company of California petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Tenth Circuit in these cases.

### OPINIONS BELOW

The opinions of the court of appeals are reported at 772 F.2d 613 (hereinafter "*Inactive-Sites Case*") (App. A, *infra*, 1a-42a) and 772 F.2d 640 (hereinafter "*Active-Sites Case*") (App. B, *infra*, 43a-64a). The EPA standards at issue, together with the EPA preamble to the

standards, are reported at 48 Fed. Reg. 590 (App. C, *infra*, 65a-121a), and 48 Fed. Reg. 45926 (App. D, *infra*, 122a-208a). The standards are codified at 40 C.F.R. Part 192, Subparts A-E.

## JURISDICTION

The judgments of the court of appeals in both cases were entered on September 3, 1985. Petitions for rehearing were denied on October 30, 1985 (App. E, *infra*, 209a-210a; App. F, *infra*, 211a-212a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTE AND REGULATIONS INVOLVED

Relevant portions of the Uranium Mill Tailings Radiation Control Act of 1978 ("UMTRCA"), Pub. L. No. 95-604, 92 Stat. 3021 (1978) (codified as amended at 42 U.S.C. § 2014 and scattered sections thereafter and at 42 U.S.C. §§ 7901-42), are reprinted in App. G, *infra*, 213a-216a. The EPA's Standards for Remedial Actions at Inactive Uranium Processing Sites ("Inactive-Site Standards") and Environmental Standards for Uranium and Thorium Mill Tailings at Licensed Commercial Processing Sites ("Active-Site Standards"), both at issue here, are reprinted in App. C, *infra*, 112a-121a, and D, *infra*, 291a-208a, respectively.

## STATEMENT OF THE CASE

This case arises from petitions to review two sets of standards promulgated by the United States Environmental Protection Agency ("EPA") under color of authority provided by the Uranium Mill Tailings Radiation Control Act of 1978 ("UMTRCA"), Pub. L. No. 95-604, 92 Stat. 3021 (1978). One set of standards govern the stabilization and control of uranium mill tailings—sand-like waste materials that result from the milling of uranium ore—located at designated "inactive" uranium processing sites (App. C, *infra*, 112a-121a). The other, substantively similar, set of standards govern the stabilization and control

of mill tailings at licensed commercial uranium and thorium processing sites, referred to as "active sites." (App. D, *infra*, 201a-208a).

### A. The Target of EPA's Standards

Petitioners own or operate licensed "active" uranium processing sites, and are subject to potential liability for the cleanup of several "inactive" sites. Petitioners' uranium mills process uranium ore into uranium concentrate, which is one of the initial steps in the production of uranium fuel for nuclear power reactors. Congress has declared that this segment of the American energy industry is "vital to the common defense and security." 42 U.S.C. § 2012(a). At present, however, the industry is extremely depressed—in fact, the United States Department of Energy ("DOE") recently reported to Congress that the industry is no longer "viable."[1] The standards at issue, which impose costly and far-reaching requirements for the treatment of mill tailings wastes, will, in petitioners' view, impose a possibly fatal blow to this already depressed industry.[2]

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[1] Energy Information Administration, *Domestic Uranium Mining and Milling Industry: 1984 Viability Assessment*, DOE EIA-0477 (Washington, D.C. Sept. 1985) (study conducted pursuant to 42 U.S.C. § 2210b concludes that in 1984 the domestic uranium industry was not viable). *See* 131 Cong. Rec. E4275 (daily ed. Oct. 1, 1985) (remarks of Rep. Richardson). *See also U.S. Uranium Mines, Thriving 5 Years Ago, Are Nearing Extinction*, Wall St. J., June 12, 1985, at 1, Col. 1.

[2] A DOE spokesman recently estimated that cleanup of the existing *active* sites alone could cost over $4 billion. *Hearing on H.R. 2236 and S. 1004: Financing Remedial Actions At Active Uranium and Thorium Processing Sites, Before the House Comm. on Interior and Insular Affairs, Subcomm. on Energy and the Environment*, 99th Cong., 1st Sess. (July 16, 1985) (written submission of James W. Vaughn, DOE) (remedial action at active sites could cost over $4 billion if conducted by the federal government). By way of contrast, EPA justified its active-site standards on the basis that the cost of compliance at existing sites would be $260 million. (App. D, *infra*, 197a).

The licensed and inactive uranium processing sites targeted by the EPA standards at issue contain sizeable quantities of mill tailings, which are crushed ore residues from which uranium, thorium or other radioactive rare earth compounds have been extracted. Under ordinary and commonly employed practices and procedures, the tailings are collected in tailings retention systems near a mill or processing facility. Such tailings piles typically cover large areas, sometimes up to 400 acres.[3] Because the milling process serves to remove uranium or thorium from the ore, the tailings are *less* radioactive than the native rock from which they were derived. Nonetheless, the tailings contain residual amounts of uranium or thorium and may emit small amounts of radioactive substances into the environment, including radon, a naturally occurring radioactive gas.

According to EPA, the short-lived decay products of radon gas are the primary source of potential radiation exposure from uranium mill tailings. (App. D, *infra*, 135a). Radon is emitted not only from tailings piles, but in variable quantities from a number of natural sources, including normal soils. As such, it is a ubiquitous, natural constituent in the atmosphere. Radon also emanates from common building materials, such as concrete floors, gas stoves, fireplaces, and bricks. The amount of radon that is released from uncontrolled tailings piles is trivial when compared to the amount released from such natural and common sources.[4]

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[3] EPA, *Final Environmental Impact Statement for the Control of Byproduct Materials From Uranium Ore Processing (40 C.F.R. 192)* ("FEIS"), Vol. I, 3-6, 3-7, EPA-520 (Sept. 1983).

[4] The Nuclear Regulatory Commission (NRC) and National Council on Radiation Protection and Measurements (NCRP) estimate that radon emissions from mill tailings constitute 0.2% of the radon released by natural soils in the United States. *Hearings on EPA Radon and Radionuclide Emission Standards Before the House Subcomm. on Procurement and Military Nuclear Systems of the Comm. on Armed Services*, 98th Cong., 1st Sess., 85 (Oct. 6, 1983).

The levels of human exposure to radiation that are attributable to mill tailings are very low.[5] Tailings piles are located almost exclusively in the western half of the United States, typically in isolated, arid regions with little or no nearby population. Moreover, the concentration of radon found in the air near uranium mill tailings piles declines rapidly as a function of distance from the piles. In fact, comprehensive studies have concluded that radon concentrations are the same as background (natural) levels only one-half mile downwind from an uncontrolled tailings pile.[6] Nonetheless, EPA has issued stringent standards that require extensive control measures to reduce the levels of radon emitted from mill tailings.

### B. Statutory and Regulatory Background

Uranium milling has long been regulated by the federal government and by certain states (known as "Agreement

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[5] Although petitioners challenge EPA's risk analysis, EPA itself estimates that five Americans per year—or roughly one out of every 45 million Americans per year—may develop fatal lung cancer due to mill tailings located at active sites. FEIS, Vol. I, at 10-6. By contrast, EPA estimates that at least 4,000 Americans—800 times as many—may die each year due to the effects of naturally occurring radiation. 47 Fed. Reg. 58202 (Dec. 29, 1982). EPA concedes that "epidemiological studies . . . are inadequate to either prove or disprove the hypothesis that there are adverse health effects [resulting from mill tailings]." FEIS, Vol. II at A.4-49. Moreover, prior to the promulgation of the EPA standards at issue, an NRC Appeal Board concluded, after consideration of extensive evidence on the health effects of radon emissions from milling and mill tailings, that "the record establishes without contradiction that the radon contribution of the uranium fuel cycle is a minute fraction of the radon released into the atmosphere from other sources" and that "the *incremental* health risk to the population stemming from the fuel cycle emissions (if indeed there is any) is vanishingly small." Philadelphia Electric Co., *et al.* (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-701, 16 NRC 1517, 1524, 1528 (1982), *petition for review held in abeyance*, CLI-83-14, 17 NRC 745 (1983).

[6] U.S. Department of Health, Education and Welfare, Public Health Service, *Evaluation of Radon 222 Near Uranium Tailings Piles*, DER 69-1 (March 1969).

States")[7] under the Atomic Energy Act of 1954, as amended, 42 U.S.C. §§ 2011 *et seq.* Prior to the enactment of UMTRCA, the Atomic Energy Commission (the NRC's predecessor) promulgated detailed regulations controlling releases of radioactive materials from uranium mills to "unrestricted areas"—*i.e.*, areas outside the control of the mill operator. These regulations, which are set forth in 10 C.F.R. Part 20, specify limits for the emission to off-site locations of more than 200 different radioactive isotopes, and include limitations for both airborne radioactivity and effluent contamination. *See* 10 C.F.R. §§ 20.105, 20.106; 10 C.F.R. Part 20, App. B.

Prior to 1978, however, the NRC's jurisdiction over uranium mill tailings was derived only from its authority to regulate a licensee's handling of "source materials" such as uranium ore, but ceased after a mill shut down and the operator's license expired. *See* H.R. Rep. No. 1480, 95th Cong., 2d Sess., Part 2, 28, *reprinted in* 1978 U.S. Code Cong. & Ad. News, 7450, 7456. In order to remedy this jurisdictional gap, and in response to concerns created by the use of mill tailings for construction purposes, *see id.*, Congress enacted UMTRCA in 1978. The preamble to UMTRCA provides:

> "The Congress finds that uranium mill tailings located at active and inactive mill operations *may* pose a *potential* and significant radiation health hazard to the public, and that the protection of the public health, safety, and welfare and the regulation of interstate commerce require that every *reasonable* effort be made to provide for the stabilization, disposal, and control in a safe and environmentally sound manner of such tailings in order to prevent or minimize radon diffusion into the environment

[7] Section 274 of the Atomic Energy Act, 42 U.S.C. § 2021, provides that states may regulate certain Atomic Energy Act activities (including uranium milling) if they first enter into "discontinuance agreements" with the federal government.

> and to prevent or minimize other environmental hazards from such tailings."

42 U.S.C. § 7901(a) (App. G, *infra*, 216a) (emphasis added). Title I of the Act, codified at 42 U.S.C. §§ 7901-42, directed EPA to promulgate "standards of general application . . . for the protection of the public health, safety and the environment" from hazards associated with mill tailings at *inactive* uranium processing sites, and directed DOE to undertake necessary cleanup activities at these sites pursuant to EPA's standards. 42 U.S.C. § 2022(a) (App. G, *infra*, 213a). Title II of UMTRCA, codified in scattered sections of the Atomic Energy Act, directed EPA to promulgate separate "standards of general application . . . for the protection of public health, safety and the environment" that would apply to *active* sites, and directed the NRC (and Agreement States) to regulate these sites pursuant to EPA's "active-site" standards. 42 U.S.C. § 2022(b)(1) (App. G, *infra*, 214a).[8]

Before EPA acted in fulfillment of its obligations, Congress amended UMTRCA to clear up confusion within the agencies about the intended regulatory program. NRC Authorization Act of 1982 and 1983 ("1982 UMTRCA Amendments"), Pub. L. No. 97-415, 96 Stat. 2067 (1983). The 1982 UMTRCA Amendments explicitly required the EPA, in establishing its standards for both active and inactive mills, to

> "consider the risk to the public health, safety and the environment, the environmental and economic costs of applying such standards, and such other factors as the Administrator determines to be appropriate."

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[8] The NRC was directed by UMTRCA to "insure that the management [of mill tailings] is carried out in such manner as . . . conforms with applicable general standards promulgated by the Administrator of the Environmental Protection Agency under Section 2022 of this title . . . ." 42 U.S.C. § 2114(a).

Pub. L. No. 97-415, § 22(b), 96 Stat. at 2080 (1983), *codified at* 42 U.S.C. § 2022(a), (b) (App. G, *infra*, 213a-215a).[9]

### C. The EPA Standards At Issue

One day after enactment of the 1982 UMTRCA Amendments, EPA issued its standards for inactive uranium processing sites. 48 Fed. Reg. 590 (Jan. 5, 1983) (App. C, *infra*, 112a-121a). The EPA inactive-site standards contain stringent requirements for the control and disposal of tailings, including the requirement that radon gas emissions be reduced by approximately 96%,[10] so that such emissions are below 20 picocuries per meter squared per second (pCi $m^{-2}s$)[11] or 0.5 picocuries per liter in air outside the disposal site. 40 C.F.R. § 192.02 (App. C, *infra*, at 113a-114a).[12] The standards also require that emission controls be effective for "up to one thousand years, to the extent reasonably achievable, and, in any case, for at least 200 years." *Id.* Conformance to these stringent standards will require the placement of thick and costly earthen covers over the thousands of acres of tailings piles at inactive sites. (App. C, *infra*, 85a-86a).

EPA published its "active-site" standards on October 7, 1983. 48 Fed. Reg. 45926 (App. D. *infra*, 201a-208a). These standards establish the same radon emission and longevity requirements as the inactive-site standards, 40 C.F.R. § 192.32(b) (App. D, *infra*, at 205a-206a), and conformance will also require the placement of thick earthen covers over tailings piles. (App. D, *infra*, 141a-143a).

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[9] Similarly, the NRC was directed to consider risks and costs in fulfilling its management and regulatory responsibilities over mill tailings. Pub. L. No. 97-415, § 22(a), 96 Stat. at 2080 (1983), *codified at* 42 U.S.C. § 2114(a).

[10] *See* App. C, *infra*, 73a.

[11] A picocurie is a unit of radioactivity.

[12] This radon-222 concentration limit is six times as stringent as the radon-222 concentration limit for unrestricted areas set forth in 10 C.F.R. § 20.106(a) and App. B, Table II.

Petitioners have contended, both in comments before the EPA and during the proceedings in the court below, that these stringent standards were not supported by the evidence before the EPA and cannot be justified on the basis that they are necessary to eliminate demonstrable risks. Petitioners presented evidence derived from respected scientific authorities that EPA grossly exaggerated the health risks posed by radon from mill tailings and based its radon emission limit on arbitrary and unsupportable assumptions.[13]

Most important, however, is that EPA maintained throughout the proceedings below that it was not even *required* by UMTRCA to find that mill tailings pose significant risks prior to promulgation of new standards. Indeed, in the preamble to EPA's active-site standards, EPA squarely rejected the notion that it was required to assess the significance. (App. D, *infra*, 155a-157a).[14] Instead, EPA argued that the language and legislative history of UMTRCA rendered it unnecessary for the agency to make its own determination that mill tailings pose risks that require new regulation.

### D. Opinions of the Court Below

Petitioners challenged EPA's mill tailings standards by filing petitions for review in the United States Court of Appeals for the Tenth Circuit pursuant to 42 U.S.C. § 2022(c)(2). The court of appeals agreed with EPA's interpretation of UMTRCA, and rejected petitioners' argument that UMTRCA required the EPA to find that mill tailings pose a significant risk prior to the promulgation of new standards. *Inactive-Sites Case* (App. A, *infra*, 15a-20a).

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[13] The record is replete with such evidence. *See, e.g.*, FEIS, Vol. II at A. 2-13, A. 2-15, A. 2-25 (EPA risk estimates are more conservative than those of the International Commission on Radiation Protection (ICRP) and National Council for Radiation Protection and Measurements (NCRP) by a factor of six).

[14] *See also* FEIS, Vol. II at A. 3-7.

The court of appeals acknowledged that the language of the UMTRCA preamble "might lead one to question whether Congress was resolute on the degree of danger mill tailings pose." (App. A, *infra*, 16a). Nevertheless, the court held that the preamble language, read in light of UMTRCA's legislative history,[15] "confirm[s] our belief that it is unnecessary for the EPA to make its own determination that the tailings pose a significant risk," *id.* at 16a, and demonstrates that "Congress chose to consider protecting future generations by enacting UMTRCA . . . ." *Id.* at 17a. The court rejected petitioners' argument that the "reasonableness" requirement in the UMTRCA preamble required EPA to assess risks prior to promulgation of new regulations, an interpretation supported by this Court's holding in *Industrial Union Department, AFL-CIO* v. *American Petroleum Institute*, 448 U.S. 607 (1980) (hereinafter "*Benzene*"). *Id.* at 15a-16a.

The court of appeals also rejected petitioners' argument that the language and legislative history of the 1982 UMTRCA Amendments imposed a "significant risk" requirement. The court concluded that the changes then enacted were "not designed to change EPA's basic regulatory approach," but merely to "set out the factors that

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[15] The court cited remarks by former NRC Chairman Joseph M. Hendrie that were reprinted in the UMTRCA House Report:

> "Unlike high-level radioactive waste from the back end of the nuclear fuel cycle, which contains products of the fission reaction, mill tailings contain only naturally occurring radioactive elements, in small quantities. . . .
>
> The health effects of this radon production are tiny as applied to any one generation, but the sum of these exposures can be made large by counting far into the future, large enough in fact to be the dominant radiation exposure from the nuclear fuel cycle."

H.R. Rep. No. 1480, Part 2, 95th Cong., 2d Sess. at 25, *reprinted in* 1978 U.S. Code Cong. & Ad. News at 7452. *Inactive-Sites Case* (App. A, *infra*, 17a).

the EPA should consider in developing the standards." *Id.* at 17a-18a.[16]

In the *Active-Sites Case* (App. B, *infra*, 42a-64a), the Tenth Circuit again rejected petitioners' argument that the EPA improperly promulgated its mill tailings regulations without finding that pre-existing controls failed to avert significant risks. The court summarily adopted its reasoning from the companion *Inactive-Sites Case.* (App. B, *infra*, 50a). Petitioners sought rehearing on the "significant risks" issue before the court of appeals in both the *Inactive-Sites Case* and the *Active-Sites Case.* The court denied petitioners requests' summarily. App. E, *infra*, 209a-210a; App. F, *infra*, 211a-212a.[17]

## REASONS FOR GRANTING THE PETITION

This case raises a legal issue of increasing importance in the field of environmental regulation, namely, whether a regulatory agency directed to undertake "reasonable" measures to reduce health risks can issue standards in a vacuum and without consideration of the significance of the risks posed by the regulated substance. The issue raised herein is also of tremendous practical importance, because the standards will have a serious economic impact on the already desperately depressed uranium milling industry.

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[16] The court dismissed, in a footnote, remarks made during the floor debate on the 1982 UMTRCA Amendments that support the interpretation urged by petitioners, noting that although such remarks provide "assistance in interpretation," the court was "constrained . . . by the language of UMTRCA and the conference report to find that no showing of significant risk is necessary." (App. A, *infra*, 19a-20a n. 8).

[17] Petitions for rehearing in both cases were also filed by the American Mining Congress ("AMC") on the ground that the court of appeals erred in holding that the EPA had jurisdiction to issue standards that govern on-site stabilization measures. Petitioners joined in the AMC's petition, and also join in the AMC's Petition for a Writ of Certiorari raising the same issue. *See* Supreme Court Rule 19.4.

As demonstrated below, the decision of the court of appeals is inconsistent with Congress' intent. Congress clearly did *not* direct EPA to promulgate new standards that would bankrupt the uranium milling industry in exchange for reduction of hypothetical and insignificant risks. To the contrary, the language of UMTRCA, when read in light of its legislative history, its 1982 Amendment, and this Court's decision in *Benzene*, compels the conclusion that prior to promulgation of new mill tailings standards the EPA was required to find that mill tailings present significant risks not addressed by pre-existing regulations. The EPA did not and cannot so find. Petitioners respectfully request that this Court review the Tenth Circuit's decision to ensure that Congress' will is followed.

**A. The Tenth Circuit Misinterpreted Both UMTRCA And The Benzene Case**

The court of appeals concluded that the language of the UMTRCA preamble embodies a congressional finding that mill tailings pose significant risks that must be addressed by new regulations. (App. A, *infra*, 16a). But the UMTRCA preamble, 42 U.S.C. § 7901(a), like the language of the Occupational Safety and Health Act ("OSHA") interpreted in *Benzene*, does *not* embody any such Congressional predetermination. In UMTRCA Congress merely found that mill tailings "*may* pose a *potential* and significant health hazard," and directed that "every *reasonable* effort be made to provide for the stabilization, disposal, and control" of the tailings. 42 U.S.C. § 7901(a) (App. G, *infra*, 216a) (emphasis added). If Congress had in fact concluded that mill tailings pose significant risks, it would have eliminated the words "may" and "potential" from the UMTRCA preamble. But those words remain, and the legislative history shows that Congress' decision to use these qualifiers was deliberate.

Although, as the Tenth Circuit noted, there was testimony presented at the 1978 UMTRCA hearings to the

effect that mill tailings may pose a hazard to future generations, the testimony was qualified. In fact, the passage concerning risks from former NRC Chairman Hendrie's testimony quoted by the Tenth Circuit in the *Inactive Sites Case* (App. A, *infra*, 17a) is immediately followed by the following:

> "Whether it is meaningful to attach significance to radiation exposures thousands of years in the future, or conversely, whether it is justifiable to ignore them, are questions without easy answers."

H.R. Rep. No. 1480, Part 2, 95th Cong. 2d Sess. at 25, *reprinted in* 1978 U.S. Code & Ad. News at 7452. After listening to such testimony, Representative Udall, a prime sponsor of UMTRCA, stated:

> "The more I sit here the more I wonder whether we are just talking about something that is not really a hazard. Both you and Mr. Hendrie have said that smoking a cigarette is more dangerous than sitting up on the pile." [18]

Given the technical complexity of the issues, such uncertainty as to the risks posed by tailings is understandable. And because of this uncertainty, Congress chose not to require standards more stringent than those already governing radioactive substances [19] without regard to the risks posed by tailings, but instead found that mill tailings "may" pose risks and directed that "reasonable" efforts be undertaken to address the issue. 42 U.S.C. § 7901(a) (App. G, *infra*, 216a).[20] It was left to the

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[18] *Uranium Mill Tailings Radiation Control Act of 1978: Hearings on H.R. 13382, H.R. 12938, H.R. 12535 and H.R. 13049 Before the Subcomm. on Energy and Environment of the House Comm. on Interior and Insular Affairs*, 95th Cong., 2d Sess. 98 (1978).

[19] *See, e.g.*, 10 C.F.R. Part 20 (prior NRC standards for releases of radioactive substances into unrestricted areas).

[20] Indeed, the Tenth Circuit acknowledged that in 1978 Congress "chose to *consider* corrective action to address mill tailings." *Inactive Sites Case* (App. A, *infra*, 17a).

agencies to decide whether mill tailings present risks significant enough to make new and tougher standards "reasonable."

This congressional decision, which is ultimately reflected in the statutory language, is indistinguishable from the decision reached by Congress in enacting OSHA, the statute at issue in *Benzene*. The Government argued there, as here, that the statute's mandatory direction that standards be established *required* the Agency to set a new standard for benzene without regard to the significance of the risks presented by benzene exposures at levels below the previous standard. *Benzene*, 448 U.S. at 639.[21] Nonetheless, because of a provision of OSHA requiring that standards be "reasonably necessary or appropriate," 29 U.S.C. § 652(b), the *Benzene* plurality construed the Act to require a threshold finding that benzene exposure below the previous standard presents significant risks.[22] 448 U.S. at 639-43.

The crux of the *Benzene* decision is that new standards designed to abate insignificant risks are "unreasonable." *Id.* The Tenth Circuit's hasty attempt to distinguish *Benzene* on the basis that it concerned a "different statute" ignores the striking similarity between the operative language of OSHA and UMTRCA. In addition, as discussed further below, the legislative history of UMTRCA

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[21] In *Benzene*, the government relied heavily on a section of OSHA in which Congress directed that the Secretary "*shall set the standard* which most adequately assures, to the extent feasible . . . that no employee will suffer material impairment of health . . ." § 6(b)(5), 29 U.S.C. § 655(b)(5).

[22] The plurality's reasoning in *Benzene* has been adopted by this Court in American Textile Manufacturers Institute, Inc. v. Donovan, 452 U.S. 490 (1981), and followed outside of the OSHA context. *See* Center for Auto Safety v. Peck, 751 F.2d 1336, 1345 (D.C. Cir. 1985) (requirement in National Traffic and Motor Vehicle Safety Act that "unreasonable" risks be addressed justifies agency determination that more stringent bumper standards are unnecessary, citing *Benzene*).

compels the same "significant risk" interpretation here that the plurality adopted in *Benzene*.

**B. The 1982 UMTRCA Amendments and Legislative History Reaffirm the Significant Risk Requirement**

The UMTRCA regulatory requirements were specifically addressed by Congress in 1982, after a period of regulatory confusion and inaction. To the extent that this uncertainty was caused by the language of UMTRCA as originally enacted, the interpretation placed on the statute by Congress in 1982 is instructive, particularly since it was accompanied by amendments to the original statute. As this Court has stated, the views of a subsequent Congress as to the meaning of disputed or obscure earlier language "are entitled to significant weight." *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, 444 U.S. 572, 596 (1980); *accord*, *Kalaris* v. *Donovan*, 697 F.2d 376, 392 n.65 (D.C. Cir.), *cert. denied*, 462 U.S. 1119 (1983).

The 1982 UMTRCA Amendments specifically directed the EPA in *establishing* standards to "consider the risk to the public health, safety and the environment." Pub. L. No. 97-415, § 22(b), 96 Stat. at 2080, *codified at* 42 U.S.C. § 2022(a), (b) (emphasis added) (App. G, *infra*, 213a-216a). In addition, the Conference Report accompanying the 1982 UMTRCA Amendments confirms that Congress' consistent intention was that the *EPA* independently assess the "potential" risks posed by mill tailings, because Congress' assessment was inconclusive. The Conference Report explicitly states:

> "An EPA regulatory role in this area should . . . be brought to bear on the task of *assessing* and controlling the risks posed by uranium mill tailings and developing general environmental standards only if a regulatory program including EPA can be implemented with certainty and in a timely manner."

House Conf. Rep. No. 884, 97th Cong., 2d Sess., 44, *reprinted in* 1982 U.S. Code Cong. & Ad. News 3603, 3614-15 (emphasis added). If Congress had concluded in 1978

that mill tailings pose significant risks, then EPA "assessment" of the risks in 1982-83 would be unnecessary.

Moreover, remarks made during the floor debates on the 1982 Amendments confirm Congress' intent to require an agency finding of significant risk. Numerous legislators, including several sponsors of the Amendments and the Senate floor manager, stressed that UMTRCA standards should not be adopted to abate insignificant risks. The court below erred in ignoring such explicit evidence of congressional intent, especially because its proponents were key legislators and their interpretation was not rebutted during the floor debates.[23]

Senator Simpson, the Senate floor manager of the 1982 UMTRCA Amendments, explained that UMTRCA does not direct that any specific regulatory standards be set, but directs the agencies independently to assess the risks presented and to determine the significance of those risks prior to taking further regulatory action. His colloquy with Senator Wallop illustrates these points and directly contradicts the Tenth Circuit's interpretation of the UMTRCA preamble:

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[23] Remarks during Congressional debate by a bill's sponsors deserve to be accorded "substantial weight" in interpreting a statute, *Federal Energy Administration* v. *Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976); *State of Kansas ex. rel. Stephan* v. *Adams*, 608 F.2d 861 (10th Cir. 1979), *cert. denied*, 445 U.S. 963 (1980), and when remarks by the floor manager of the bill explain the conference committee's actions, they are "authoritative indicators of Congressional intent." *Pan American Airways, Inc.* v. *Civil Aeronautics Board*, 380 F.2d 770, 781-82 (2d Cir. 1967), *aff'd*, 391 U.S. 461 (1968). The court of appeals' decision to discount these remarks was premised on its view that the language of UMTRCA and the 1982 Conference Report compel the opposite result (App. A, *infra*, 20a). However, as demonstrated above, the language of the statute and the 1982 Conference Report, if anything, confirm petitioners' interpretation—and certainly do not support the court of appeals' view with the degree of certainty required to make further exploration of the legislative history superfluous.

> "Mr. WALLOP. . . . It is my understanding that EPA and NRC have stated that they felt compelled by the Mill Tailings Act to impose stringent requirements . . . irrespective of costs, because of language in the preamble to the 1978 Mill Tailing Act. From my reading of the applicable provision, the 1978 act directed the agencies to take 'every reasonable effort' necessary to protect public health. Implicit in that language is a direction to exercise reasonable discretion. Have the amendment [sic] dispelled the misapprehension of the agencies on this point?
>
> "Mr. SIMPSON. I say . . . that, in my best estimate, they have. . . . *The agencies should determine the risks associated will* [sic] *mill tailings and the significance of those risks. They should also examine various regulatory approaches to deal with significant risks that are identified.* . . . In short, Congress has not directed any specific regulatory program. On technical issues relating to the regulation of mill tailings, EPA and NRC should both exercise reasonable judgment on the appropriate course to accomplish the basic purpose of the act, which is to protect the public health and safety from *unreasonable risks*."

128 Cong. Rec. S13055-56 (daily ed. Oct. 1, 1982) (emphasis added).

Similarly, Senator Schmitt, a cosponsor of the 1982 UMTRCA Amendments, reiterated the view that the agencies' regulatory mission under UMTRCA is limited to the reduction of demonstrably significant risks:

> "[T]he conferees have adopted language . . . to require . . . EPA to weigh the significance of the risk associated with mill tailings and to develop regulatory requirements whose burdens are reasonably related to the expected benefits. . . . This should lay to rest the position by some agency officials that they are required, under the preamble to the Mill Tailings Act, to impose certain kinds of controls on

> mill tailings regardless of risk and regardless of cost."

128 Cong. Rec. S13293 (daily ed. Oct. 1, 1982) (remarks of Sen. Schmitt). Elsewhere, Senator Schmitt stated not only that the 1982 Amendments require preliminary risk assessment, but also that in his view:

> "the risks posed by uranium mill tailings are conjectural and vanishingly small . . . . It is obviously highly questionable to invest hundreds of millions of dollars to further decrease a risk which is already slight and moreover is only hypothetical in the first place. . . .
>
> "I am confident that the Mill Tailings Act, as amended by this legislation, will fully and completely protect the public health, safety and the environment, while at the same time preventing an irrational crusade by regulatory agencies against all remote and hypothetical risks."

128 Cong. Rec. S2977 (daily ed. March 30, 1982) (remarks of Sen. Schmitt).[24]

Similar remarks in the House indicate Congress' intent to require a finding of significant risk. Representative Lujan, a sponsor of the 1982 Amendments and a House conferee, observed:

> "All the conferees agreed that the public health and safety is paramount in the regulation of mill tailings. We also agreed, however, that costly regulatory

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[24] In fact, Senator Schmitt reprinted in the *Record* a substantial section of a DOE Report entitled "Plan for Stabilization and Management of Commingled Uranium Mill Tailings," June 30, 1982, in which DOE recommended that tailings cleanup programs be flexible, site-specific, and preceded by agency risk assessment. He noted that the DOE report questioned whether "the insignificant hazards associated with tailings justified expensive remedial action efforts, particularly since the remedial action efforts themselves would pose risks and these risks might well exceed the risks avoided." 128 Cong. Rec. S15315 (daily ed. Dec. 16, 1982) (remarks of Sen. Schmitt).

> burdens should not be imposed . . . to address insubstantial risks. . . . [W]e intend that the agencies must independently exercise their best technical judgment, and employ proper measurement data and scientific procedures, to determine the risks involved from tailings and to craft an appropriate set of requirements designed to deal with those risks which are significant."

128 Cong. Rec. H8816 (daily ed. Dec. 2, 1982) (remarks of Rep. Lujan) (emphasis added). He later stated unequivocally that the EPA and NRC are required by UMTRCA to find that mill tailings pose significant risks *before* promulgating standards:

> "[M]any of us were troubled by numerous indications that the [mill tailings] regulations were largely devoted to minimizing radon flux from tailings piles but that the radon emanating from the piles did not pose a significant risk to the general population or, for that matter, to local residents. Obviously it makes no sense to impose costly regulations on industry and on taxpayers to address insignificant risks. NRC and EPA must review this question and, *before imposing substantial regulatory burdens, must actually ascertain that a risk is significant* by comparing it to other risks which we as society view as significant . . . We decided to clarify our intent that the agencies regulate only significant risks . . . by adopting Section 22."

128 Cong. Rec. E5060 (daily ed. Dec. 10, 1982) (remarks of Rep. Lujan) (emphasis added). Representative Skeen similarly stressed that the EPA must weigh "the significance of health risks" and issue reasonable standards "assuming arguendo that further standards beyond those specified in 10 C.F.R. Part 20 are required." 128 Cong. Rec. H8807 (daily ed. Dec. 2, 1982) (remarks of Rep. Skeen).

The Tenth Circuit clearly erred by ignoring or discounting this extensive legislative history, which demonstrates that Congress intended the EPA independently to

assess the significance of the risks posed by mill tailings and to promulgate new standards only if the agency determines that the significance of the risks justifies action. Because the EPA took the position that it was not required to find that tailings pose significant risks, and in fact made no such finding prior to promulgation of its mill tailings standards, the standards were issued without satisfaction of the requirements of UMTRCA. This Court should not permit the EPA to ignore the dictates of Congress and the requirements of the Court's decisions, especially when the result will be implementation of unnecessarily stringent standards that may bankrupt a vital segment of the United States energy industry.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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